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December 10, 2021

By ECF

Hon. Taryn A. Merkl
United States District Court
Eastern District of New York
225 Cadman Plaza East, Courtroom 234 North
Brooklyn, New York 11201

*NOT ADMITTED TO THE NEW YORK BAR

Does et al v. Hochul et al, No. 1:21-cv-05067-AMD-TAM (E.D.N.Y.)

Dear Judge Merkl:

Defendants NewYork-Presbyterian Healthcare System, Inc. (“NYP”) and Trinity Health, Inc. (“Trinity”) jointly submit this letter, in advance of the December 14, 2021 telephonic conference on Plaintiffs’ Motion to Proceed Using Pseudonyms, to bring to the Court’s attention a recent decision by the Honorable Naomi Reice Buchwald of the U.S. District Court for the Southern District of New York denying a plaintiff’s motion to proceed under a pseudonym in another case challenging the implementation of a COVID-19 vaccine mandate.

In *Doe v. City Univ. of New York et al*, No. 1:21-cv-09544 (S.D.N.Y.) (“*City University*”), plaintiff John Doe, a student at John Jay College of Criminal Justice (“JJC”), brought an action against the City University of New York (“CUNY”) and CUNY administrators asserting violations of his Constitutional rights and New York State law arising out of JJC’s implementation of CUNY’s COVID-19 vaccination policy, arguing that the policy discriminates against his Christian beliefs. *City University* at 1. In a December 1, 2021 Memorandum and Order, attached hereto as Exhibit A, Judge Buchwald denied the plaintiff’s motion to proceed under the pseudonym John Doe, holding that he failed to make a showing that justifies anonymity under the factors established by the Second Circuit in *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 188–89 (2d Cir. 2008).

Specifically, addressing the first *Sealed Plaintiff* factor, Judge Buchwald stated that “[t]he fact that a case involves a medical issue is not a sufficient reason for allowing the use of a fictitious name.” *City University* at 5 (quoting *Doe v. New York State Dep’t of Health*, No. 20 Civ. 04817, 2020 WL 5578308, at *3 (S.D.N.Y. Sept. 17, 2020)). The court found—as is the case here—that “there is no independent medical issue separate and apart from plaintiff’s refusal to receive a COVID-19 vaccine on religious grounds.” *Id.* at 6. Judge Buchwald noted that, under such circumstances, “relying on a medical issue as a basis for anonymity does not withstand analysis.” *Id.*

Judge Buchwald went on to find that the second and third *Sealed Plaintiff* factors, relating to the risk and severity of harm from disclosure, “cut strongly against” the plaintiff, *id.* at 8, in the absence of a “particularized showing of harm.” *Id.* at 9 n.2. In that case, plaintiff had failed to establish “with sufficient specificity the incremental injury that would result from disclosure of his identity” “to justify the exceptional relief of proceeding anonymously.” *Id.* at 8 (quoting *Doe v. Freydin*, No. 21 Civ. 8371, 2021 WL 4991731, at *2 (S.D.N.Y. Oct. 27, 2021)). Judge Buchwald noted that “statements expressing a lack of patience or frustration at unvaccinated people do not support plaintiff’s claim that he would be subject to ‘extensive harassment and perhaps even violent reprisals,’ and do not suffice to justify anonymity,” *id.* at 9 (quoting *Doe v. Skyline Automobiles Inc.*, 375 F. Supp. 3d 401, 406 (S.D.N.Y. 2019)) (emphasis added), and that plaintiff in that case—like each of the plaintiffs here—“presents no evidence of the specific harm that he would be subject to if his name were disclosed.” *Id.* at 10.

With respect to the fifth *Sealed Plaintiff* factor, Judge Buchwald noted the fact that the case involves “a suit against a government entity . . . is not dispositive.” *Id.* at 12 (quoting *Doe v. City of New York*, No. 19 Civ. 9338, 2021WL 964818, at *2 (S.D.N.Y. Mar. 15, 2021)). Given that—as is the case here—the plaintiff was also suing private defendants, this factor did not “weigh in favor of allowing plaintiff to proceed anonymously.” *Id.* at 13. The court also found that the sixth *Sealed Plaintiff* factor, which evaluates the prejudice to defendants absent disclosure, “cuts against plaintiff,” for reasons consistent with those raised by defendants here. *Id.* Notably, the court found harm to defendants despite plaintiff’s proposal to disclose his identity to defendants under

the terms of a protective order because “concealment of plaintiff’s identity from the public can still hamper defendants’ ability to conduct discovery.” *Id.* (citing *Rapp v. Fowler*, No. 20 Civ. 9586, 2021 WL 1738349, at *7 (S.D.N.Y. May 3, 2021)).

As for the seventh factor, “which asks whether plaintiff’s identity has remained confidential,” *id.* at 13, the court noted that, “[a]s a general matter, vaccination status is not inherently confidential: mandatory vaccination and the disclosure thereof is well established.” *Id.* at 14 (citations omitted). And, as defendants have argued here, Judge Buchwald agreed that the eighth factor, “whether the public’s interest in the litigation is furthered by requiring the plaintiff to disclose his identity” “cuts against plaintiff.” *Id.* at 15. With respect to the ninth *Sealed Plaintiff* factor, the court rejected plaintiff’s argument that the issues in that case are primarily legal in nature, thereby weakening the public’s interest in disclosure. *Id.* at 15–16. The court found that the complaint there “put factual questions about [plaintiff’s] actions at issue” by raising “not just the legal issue of whether the Student COVID-19 Vaccination Policy . . . is facially Constitutional, but also whether the refusal to provide a religious exception to plaintiff specifically is Constitutional.” *Id.* at 16. So too, here, where plaintiffs have brought Title VII and other claims against the private employer defendants, based on facts specific to their employment.

Finally, concerning the tenth *Sealed Plaintiff* factor, Judge Buchwald noted that there are alternative methods to protect the confidentiality of the plaintiff’s information, including redaction of documents, sealing, and a protective order, thereby disfavoring anonymity. *See id.*

In conclusion, the court held that “plaintiff has not met his burden of demonstrating that his ‘interest in anonymity’ outweighs the prejudice to defendants and ‘the customary and constitutionally-embedded presumption of openness in judicial proceedings.’” *Id.* at 17 (quoting *Sealed Plaintiff*, 537 F.3d at 189). The same conclusion is warranted here.

* * *

Defendants NYP and Trinity will be prepared to discuss these matters at the conference on December 14 and to answer any questions the Court may have.

Dated: December 10, 2021
New York, New York

Respectfully submitted,

By: /s/ Liza M. Velazquez

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